INDEX

	Page
Opinion below	1
Jurisdiction of this court	1
Statement	2
The applicable statute	5
Questions presented	6
Argument:	
I. Construction of the statute	6
II. There was evidence before the jury to support its finding that petitioner was responsible for the mailing of the card and letter	13
III. Argument of the United States attorney to the jury was not improper if the circulars were unmailable	16
Conclusion	17

AUTHORITIES CITED

Cases:	
Burton v. *United States*, 142 Fed. 57	8
Griffin v. *United States*, 248 Fed. 6	7
Knowles v. *United States*, 170 Fed. 409	8
Magon v. *United States*, 248 Fed. 201	8, 10
Rosen v. *United States*, 161 U. S. 29	12
Saccaringen v. *United States*, 161 U. S. 446	6
United States v. *Harmon*, 45 Fed. 414	11
United States v. *Journal Co.*, 197 Fed. 415	9
United States v. *Kennerley*, 209 Fed. 119	9
United States v. *Klauder*, 240 Fed. 501	10
Statutes:	
Act of February 13, 1925, c. 229, 43 Stat. 936, 938	1
Criminal Code, sec. 211	2, 5, 6, 11
Revised Statutes, sec. 3893	6, 11

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 102

JOHN CARLTON DYSART, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 59 of the Record. It is also reported in 4 F. (2d) 765.

JURISDICTION OF THIS COURT

The judgment to be reviewed was entered on March 11, 1925. (R. 62.)

Writ of certiorari was granted on June 8, 1925 (R. 68), pursuant to the provisions of the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Texas, under an indictment charging him in eleven counts, with depositing and causing to be deposited for mailing at El Paso a certain described printed card and letter alleged to be "obscene, lewd, and lascivious," in violation of Section 211 of the Criminal Code. (R. 1 et seq. and 15.) The several counts of the indictment differ only as to the name of the party to whom the card and letter were addressed.

The card and letter forming the basis of the several counts in the indictment read as follows (R. 2 et seq.):

> The only place in El Paso where ladies can have home comforts. The best of care and perfect seclusion during pregnancy and confinement.
>
> (Picture of the Queen Ann Home)
>
> THE QUEEN ANN HOME
>
> 4021 N. Piedras St. P. O. Box 413
>
> EL PASO, TEXAS
>
> A PRIVATE HOME FOR WOMEN DURING PREGNANCY AND CONFINEMENT. WITH EVERY FACILITY FOR THEIR CARE AND PROTECTION
>
> **This Institution is specially a private retreat for unmarried pregnant women who prefer to be away from home during preg-**

nancy and confinement to preserve individual character or family reputation.

DR. J. C. DYSART,
Resident Physician.

For Particulars Address
THE QUEEN ANN HOME
4021 N. Piedras St. P. O. Box 413
EL PASO, TEXAS

Charges Reasonable.
Correspondence Strictly Confidential
Phone M 3452 or East 821

Support the Institution that Protects Your Patient and Preserves the Good Name of the Present and Future Mothers of our Country

(Cut of the Queen Ann Home)
(Same as in Foregoing Card)

THE QUEEN ANN HOME
4021 N. Piedras Street, P. O. Box 413,
EL PASO, TEXAS

Take Taxi to the Corner of Piedras and Van Buren Streets or Call Phone East 642 and we will call for you.

Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

DEAR DOCTOR: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepared to care for a few unfortunate women who do not wish to remain at home during pregnancy and confinement.

Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medical Profession a respectable private Maternity home, conducted on strictly ethical lines, where they may send patients for advantages they cannot get at home.

We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accommodations desired.

Physicians are cordially invited to visit us while in the city.

Address all inquiries to The Queen Ann Home. Dr. J. C. Dysart, Resident Physician. Phone M 3452 or East 821.

Although on its face intended for physicians, this circular was mailed to a number of young women school-teachers, as well as to physicians. (R. 39, 48, 50.)

The trial court charged the jury that "whether the letter and printed card were obscene, lewd and lascivious is for the exclusive determination of the jury." (R. 12.)

Motions to quash the indictment, for a new trial, and in arrest of judgment, all of which raised the question whether the mail matter involved constituted a violation of the statute, were overruled. (R. 10–11 and 15–17.)

In upholding the above action of the trial court, the Circuit Court of Appeals said (R. 61):

> Commendation of existing facilities for avoiding possible unpleasant social consequences of conduct in pursuance of illicit sexual desires may be the means of covertly suggesting such desires to those whose actions are largely the result of social influences and restraints. The method adopted to bring to the notice of unmarried females an institution described as "specially a private retreat for unmarried pregnant women" may be inconsistent with customary standards of decency, though the use of indecent or obscene language is avoided. To say the least, we are of opinion that reasonable men might differ in passing on the question whether the above-mentioned letter and card were or were not obscene, lewd and lascivious, when used in the manner alleged, and that the court did not err in ruling that the indictment was not subject to objection on either of the grounds set up.

THE APPLICABLE STATUTE

The indictment was drawn under Section 211 of the Criminal Code, which, so far as pertinent, reads as follows:

> Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. * * *

QUESTIONS PRESENTED

Petitioner urges three points:

1. That the card and letter upon which the indictment is based are not obscene, lewd, or lascivious within the meaning of Section 211 of the Criminal Code.

2. That there was a failure of the evidence to establish that petitioner deposited or caused to be deposited for mailing the card and letter involved.

3. That the trial court permitted Government counsel to make "improper argument to the jury."

ARGUMENT

I

CONSTRUCTION OF THE STATUTE

In construing Section 3893, R. S., the predecessor of Section 211 of the Criminal Code, this Court said in *Swearingen* v. *United States,* 161 U. S. 446, 450:

> The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The

> words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.
>
> Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libellous. But we can not perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

After examining the reported cases, the Circuit Court of Appeals for the First Circuit thus announces the rule in *Griffin* v. *United States,* 248 Fed. 6, 8–9:

> The courts, in construing this statute, have held that the rule by which to "determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires" (*Knowles* v. *United States,* 170 Fed. 409, 412, 95 C. C. A. 579, 582; *Dunlop* v. *United States,* 165 U. S. 486, 500, 17 Sup.

> Ct. 375, 41 L. Ed. 799; *Rosen* v. *United States,* 161 U. S. 29, 43, 16 Sup. Ct. 434, 40 L. Ed. 606), and that it is not essential to the commission of the offense that the entire contents of the communication be objectionable in character (*Demolli* v. *United States,* 144 Fed. 363, 366, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121).

The same rule was laid down by the Circuit Court of Appeals for the Eighth Circuit in *Burton* v. *United States,* 142 Fed. 57, 63, and the Circuit Court of Appeals for the Ninth Circuit in *Magon* v. *United States,* 248 Fed. 201, 203.

The trial court below, in its charge to the jury, directed that body to apply the above-mentioned test in determining whether the card and letter here involved were obscene, lewd, or lascivious. (R. 13.)

The courts are now in apparent harmony as to the cases in which they should assume the function of determining whether any specified matter is or is not obscene, lewd, or lascivious.

In *Knowles* v. *United States,* 170 Fed. 409, 411, the Circuit Court of Appeals for the Eighth Circuit said:

> Whenever reasonable minds might fairly reach different conclusions as to the character of the writing, it is the duty of the court to submit the question to the jury. *Rosen* v. *United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *United States* v. *Bennett,* 16 Blatchf. 342, Fed. Cas. No.

14,571; *United States* v. *Davis* (C. C.) 38 Fed. 326; *United States* v. *Harmon* (D. C.) 45 Fed. 418.

In *United States* v. *Journal Co.*, 197 Fed. 415, 416, the United States District Court for the Eastern District of Virginia said:

> The question of the character of the contents of the paper—namely, whether it comes within the inhibited class named in the statute—is one ordinarily to be determined by the jury under appropriate instructions from the court—that is, when there is such doubt as to the meaning and effect of the same, that persons would reasonably differ in respect thereto. But, on the other hand, if the publication complained of be such that it could not by any reasonable judgment be held to come within the prohibition of the law, then it becomes the duty of the court as matter of law to pass upon the same. *Knowles* v. *United States*, 170 Fed. 409, 411, 95 C. C. A. 579, and cases cited; *United States* v. *Dempsey* (D. C.), 188 Fed. 450.

In *United States* v. *Kennerley*, 209 Fed. 119, 120, the United States District Court for the Southern District of New York thus states the applicable rule:

> Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States*

v. *Clarke* (D. C.), 38 Fed. 500; *United States* v. *Smith* (D. C.), 45 Fed. 478.

In *Magon* v. *United States,* 248 Fed. 201, 203, the Circuit Court of Appeals for the Ninth Circuit in defining the word "obscene" as meaning matter which "would tend to corrupt the morals of those whose minds are open to such influences," etc., said:

> * * * and that whether or not it had such tendency was a question for the jury. *Rosen* v. *United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles* v. *United States,* 170 Fed. 409, 95 C. C. A. 579; *United States* v. *Bennett,* Fed. Cas. No. 14,571; *McFadden* v. *United States,* 165 Fed. 51, 91 C. C. A. 89; *Demolli* v. *United States,* 144 Fed. 363, 75 C. C. A. 365; *United States* v. *Musgrave* (D. C.) 160 Fed. 700; *United States* v. *Harmon* (D. C.) 45 Fed. 414; *United States* v. *Clarke* (D. C.) 38 Fed. 732.

In *United States* v. *Klauder,* 240 Fed. 501, 505, the United States District Court for the Northern District of New York said:

> On demurrer the court has only power to decide whether the book or paper or letter is so clearly innocent that a jury should not pass on it at all. *United States* v. *Kennerley* (D. C.) 209 Fed. 119. That can not be said in this case.
>
> The demurrer is overruled.

In *United States* v. *Harmon,* 45 Fed. 414, 417–418, the court was considering Section 3893, R. S., now Section 211 of the Criminal Code, and said:

> Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such can not be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls—the family, which is the common nursery of mankind, the foundation rock upon which the state reposes? The question was asked with eloquent energy by the learned counsel, commenting on the term "deemed" to be obscene, as employed by Mr. Justice Field in *Ex parte Jackson, supra* (96 U. S. 727): Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? Shall every postmaster have the power to deem the matter injurious to the public morals? Shall one postmaster deem a thing injurious and another harmless, and shall the freedom of the press be at the mercy of an indifferent

> lot of postmasters exercising no responsible discretion? The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they most nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jury box, and apply this average judgment to the law and the facts.

In *Rosen* v. *United States*, 161 U. S. 29, 43, this Court said:

> * * * But it is proper to add that it was competent for the court below, in its discretion, and even if it had been inclined to regard the paper as obscene, lewd, and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper within the contemplation of the statute under which the indictment was framed.

II

THERE WAS EVIDENCE BEFORE THE JURY TO SUPPORT ITS FINDING THAT PETITIONER WAS RESPONSIBLE FOR THE MAILING OF THE CARD AND LETTER

The record discloses no such absolute failure of proof regarding petitioner's responsibility for the mailing of the card and letter here involved, as would justify this Court in reversing the judgment below on that account. The evidence that petitioner caused the circular to be mailed to physicians was clear. The evidence to support the charge that he intended it to be mailed to young women was enough for a jury, though not so conclusive.

The following admission by petitioner is included in the bill of exceptions at page 31 of the record:

> It was admitted in open court by the Defendant that each of the persons named in the indictment received a copy of the matter set out in the indictment, through the mails, and post marked El Paso, Texas, dated November 9, 1923.

As tending to show petitioner's responsibility for the mailing, Clara May, a Government witness, testified in part as follows (R. 36, 37–38, 44):

> I know Dr. John Carlton Dysart. I have known him more than a year. I have worked for him. I worked for Miss Giles some, I worked for her when I didn't have anything else to do, then I worked for Dr. Dysart, and then I worked for Miss Giles again.
>
> (Counsel handed witness Government Exhibits Nos. 3 and 4.)

I have seen a letter and a printed card similar to those. I saw them in Miss Giles's office, in 220 Trust Building. I don't know how I happened to see them—she was working on them, and everything that came in I looked at it. If I remember right there were about 500 of those printed letters and printed cards in Miss Giles's office. Those letters and cards were mailed out in Miss Giles's office.

* * * * *

I have seen Dr. Dysart in Miss Giles's office in connection with these letters; he came in to O. K. the proof she was putting on these letters, on the letter and the card. The proof that I have reference to that he O. K'd was the multigraph work which stated the name, resident physician, and the phone numbers. That seemed satisfactory to him, it was all right. I think Dr. Dysart O. K'd a proof in Miss Giles's office, but if he did he took it with him, because when the trial came up she looked for it and couldn't find it; then she said the Doctor took it back with him, the proof he O. K'd.

After this proof was O. K'd I saw Dr. Dysart in his office. I don't know the name of the building Dr. Dysart's office is in, but it is on the corner of San Antonio Street and Stanton Street, up above that cigar store; I don't know the name of the building. It is across the street, north of the Trust Building, upstairs above the United Cigar Stores. The occasion of my going over to his office was that I had a sore on my hand and Miss

Giles told me to go over there and have him treat it. Miss Giles told me while I was over there to kill two birds with one stone, and to ask Dr. Dysart if she should mail these letters, and he said yes, there wasn't any use bringing them over there when she could mail them. He said for her to mail them, there wasn't any use for her to bring them over—he said for Miss Giles to mail them, and he asked me about if she ran out of stamps, or how many more stamps she needed, and I told him I didn't know, and he said to have Miss Giles call him, and she did call him. I did not hear her call him, I went on with my work, I had something else to do.

I did not see Miss Giles mail these letters out. I think Miss Giles got all of those letters addressed ready to go out about November 9th. I think she completed the letters along towards the close of the day of November 9th.

* * * * *

Q. Do you know whether there is any relationship between Dr. Dysart and Miss Giles now which did not exist at the time these letters were sent out?

A. Well, I don't know, I couldn't say for sure.

Q. Did you ever have occasion to make a trip to Las Cruces with Dr. Dysart and Miss Giles?

A. Yes.

Q. What happened up there?

A. They were married, Dr. Dysart married Miss Giles.

> That was after these letters were mailed out—it was December 5th, they were married Wednesday, December 5th.
>
> * * * * *
>
> When I went over and had my hand treated Dr. Dysart told me to tell Miss Giles she could mail the letters out herself; there wasn't any need to bring them over to him. I conveyed that message to Miss Giles.

Lem Snider, also a Government witness, testified in part as follows (R. 48):

> Dr. Dysart told me Miss Giles mailed the circulars out by mistake, and he said that they were never intended to be mailed out to anybody except doctors; that he never intended to mail them out to young lady school-teachers; and it was a mistake they were sent to young lady school-teachers.

III

ARGUMENT OF THE UNITED STATES ATTORNEY TO THE JURY WAS NOT IMPROPER IF THE CIRCULARS WERE UNMAILABLE

The portion of the argument of the District Attorney to which petitioner now takes exception, appears at page 53 of the record, and reads as follows:

> I will say to you if you haven't decency enough after reading that letter and that card to say that this man ought to be stopped from sending those things to our girls then I am sorry for this community, and I hesitate to think what our sense of decency and right and wrong might be. I may be some-

> what of a Puritan; I know one thing full well, I believe in the purity of womanhood, and I will do all I can to protect them, and in so doing I am trying to urge upon you to do that, whatever you may have done that you ought not to have, what you may have not done that you ought to have done, will have no bearing on this case, for I know you are men enough, you have sense of decency enough and you are feeling the pulse of this community, which is to a sense of decency so that you will have no desire to see any girls in the future led wrong, led wrong I say simply because Dr. Dysart wants to make a business proposition out of fallen virtue, and wants to take the women, after they shall have fallen, out there and take care of them for dirty yellow gold.

If the circulars were obscene and unmailable this language, while not temperate, would not justify reversal.

CONCLUSION

This case is submitted to this Court upon the record and the opinion of the Circuit Court of Appeals, with the addition of some material which may aid the Court in reaching a conclusion. It is easy to understand that the good people of El Paso were outraged by the mailing of these circulars to respectable young women, and that the young women were indignant at the imputation they carried. Such considerations, coupled with the fact that the accused evidently did not stand well in the

community, would inevitably influence a verdict. It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful.

Many organizations maintaining maternity homes and hospitals for wayward young women anticipating motherhood out of wedlock, print and distribute descriptive matter not differing substantially from that disclosed here. The difference is that such matter is not directed to drumming up business, and the purpose back of it is social service and not, as in this case, "dirty yellow gold," as the United States Attorney said, but the question of mailability depends on the contents of the mailed matter and its effect on the persons receiving it, rather than the motive of the sender.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

O. R. LUHRING,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1926.

○